The treaty to end all investment treaties

The Termination Agreement of intra-EU BITs and its effect on sunset clauses

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23 member states of the European Union (EU) decided that it was time to fish or cut bait. On 5 May they signed a plurilateral treaty to scrap all intra-EU bilateral investment treaties (BITs) in force between them (Termination Agreement).
The timing may seem suspicious as arguments have been made that certain governmental measures adopted to stem the current Sars-Cov 2 pandemic could violate investment treaties. However, the Termination Agreement has been long in the making: in March 2018 the Court of Justice of the European Union (CJEU) ruled in its *Achmea* judgment that an intra-EU BIT applicable between the Netherlands and the Slovak Republic violated EU law. In January 2019 the EU member states declared that *all* intra-EU BITs violated EU law, were thus inapplicable and (notwithstanding their alleged inapplicability) should be terminated (for an analysis of these declarations see here). Last October member states agreed on a draft version of the plurilateral agreement to terminate intra-EU BITs and now 23 member states signed the final version of the Termination Agreement. Interestingly, Austria, Ireland, Finland and Sweden apparently have not yet signed the Termination Agreement, even though all of them expressed their intention to do so in the 2019 political declarations (however, it should be noted that Ireland in fact does not have any BIT at all).

This blog post briefly analyses the implications of the key provisions of the Termination Agreement on pending and future investment disputes in the European Union.

BITs and sunset clauses taken out of the equation

The Termination Agreement provides that all intra-EU BITs concluded between the parties shall be terminated. In addition, all sunset clauses in these BITs and of those BITs already terminated shall also be ended by virtue of this agreement. Sunset clauses (also called survival clauses) extend the protection of a BIT for an investment made prior to the termination of a BIT for a certain period of time after the termination (e.g. 20 years after the termination in the Estonia-Netherlands BIT). The terminations of the BITs and the sunset clauses take effect ‘as soon as this Agreement enters into force for the relevant Contracting Parties’. The agreement itself will enter into force 30 days after the second ratification and subsequently for each other party 30 days after it has submitted its instrument of ratification.

Moreover, as far as newly commenced arbitral proceedings are concerned Article 5 of the Termination Agreement stipulates that the 'Arbitration Clauses shall not serve as legal basis for New Arbitration Proceedings'. According to Article 1(6) of the Termination Agreement any proceedings initiated on or after 6 March 2018 (i.e. the day the CJEU delivered the *Achmea* judgment) constitute such 'New Arbitration Proceedings'. Any proceedings concluded before 6 March 2018 are not affected by this agreement (Article 6(1)) and any proceedings already pending on 6 March 2018 are offered the option of a mediated settlement or access to national courts (Articles 9 and 10). The focus on 6 March 2018 as a reference point stems from an interpretation that the reasoning of *Achmea* applies to all intra-EU BITs regardless of their specific wording (see EU Commission COM(2018) 547 final).

No sunshine when they are gone?

How will investment tribunals react to the Termination Agreement? Hitherto, arbitral tribunals have followed their long-standing arbitral jurisprudence that EU law and intra-EU BITs are not in conflict with each other and the BITs could not have been implicitly terminated by accession to the EU (see e.g. *EURAM v. Slovakia*). Any termination of intra-EU BITs would have to be explicit in accordance with the applicable rules under international law: the Vienna Convention on the Law of Treaties (VCLT) (see *Eureko v. Slovak Republic)*. Arbitral tribunals have also stressed that neither *Achmea* nor the 2019 declarations could have any effect on their jurisdiction (see e.g. *Eskosol v. Italy; United Utilities v. Estonia*). After the termination of the respective BITs new investment arbitration proceedings will generally be no longer possible. Nonetheless, according to well-established arbitral case law, pending proceedings are not affected by the termination of a BIT since states had previously consented to the arbitration through the BIT and cannot retroactively withdraw that consent once an investor commenced arbitration (so-called perfected consent) (see e.g. *Magyar Farming v. Hungary*, para. 214; *Marfin v. Cyprus*, para. 593). It would be quite surprising if the Termination Agreement caused a reversal of that reasoning adopted by investment tribunals (for the irrevocability of perfected consent see also here and here). The cut-off date for any newly commenced proceedings will be the actual termination of an intra-EU BIT, not the day *Achmea* was published. Thus, the entry into force of the Termination Agreement for the respective parties of a given BIT is the relevant date. After the termination of the BIT no consent exists for future investment disputes.

Nonetheless, it remains unresolved whether arbitral tribunals would enjoy jurisdiction if investors attempted to rely on a sunset clause, which has been mutually terminated by the parties to an intra-EU BIT. Hitherto, no arbitral tribunal had to rule on whether it could exercise jurisdiction despite a consensually terminated sunset provision. Generally, state parties remain the 'masters of the treaty', i.e. they can modify it as they see fit, but must do so explicitly. This follows from Article 70 VCLT: 'Unless […] the parties otherwise agree, the termination of a treaty […] (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.' Hence, the parties to an investment treaty arguably have the power to remove the sunset clause –and thus the rights that investors would normally enjoy after the termination of the BIT– if they so agree.

However, the peculiarity of investment treaties is that the beneficiaries (or even holders of the rights) are individuals, not states. A removal of the sunset clause would deprive their investment of international protection on which they may have relied when making the investment. Accordingly, last November an arbitral tribunal dealing with an intra-EU investment dispute held that while the state parties 'remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*' (a thing done between others does not harm or benefit others). This was said to be reflected in the sunset clause '[a provision which] shows that, *even where* the Contracting Parties *terminate the treaty on mutual consent*, they acknowledge that *long-term interests of investors* who have invested in the host State in reliance on the treaty guarantees *must be respected*. *This is the purpose served by the 20-year sunset provision*' (*Magyar Farming v. Hungary*, paras. 222-223, emphasis added). Such a reasoning seems to immunise a sunset clause from changes. Conversely, in another intra-EU investment dispute a tribunal seems to have accepted the possibility of removing the sunset clause of a BIT holding that: 'As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant "*survival*" period. Accordingly, […] the Tribunal would still have jurisdiction to hear this case.' (*UP and C.D. Holding v. Hungary, para. 265).*

These apparently contradictory observations only take us so far. Ultimately, much will depend on the wording of the sunset clause. Some sunset clauses indicate that they are only applicable to unilateral termination of treaties (e.g. Article 16 Czech Republic-Denmark BIT). The language of most of these clauses, however, does not reveal whether only unilateral or also mutual termination is covered, and the tribunal will be required to carefully assess the arguments presented. In the abstract, it seems reasonable for a tribunal to accept jurisdiction over disputes involving investments made prior to the consensual termination of a sunset clause because a sudden withdrawal of the rights guaranteed to already established investments contravenes legal security and legal certainty – principles which are arguably the *raison d'être* of investment treaties.

Another unresolved debate could play an important role in this regard, namely the nature of investors' rights. Do investment treaties directly confer rights upon investors, i.e. do these rights exist independently of the state parties' rights (see e.g. *Corn Products v. Mexico*)? Or are these rights merely derivative, i.e. rights that are only owed to the state party of the BIT, but investors are permitted to enforce these rights (see e.g. *ADM v. Mexico*)? If investment treaties directly confer rights to investors, even a mutual termination of a sunset clause should not bar a tribunal from hearing investment disputes.

Conclusion

On the one hand, the Termination Agreement finally settles the question whether intra-EU BITs will exist for much longer: they will not. On the other hand, the Termination Agreement still contributes to the clash between EU law and intra-EU investment arbitration. The attempts at having the Termination Agreement apply partially retroactively to pending arbitral proceedings should leave arbitral tribunals unimpressed when ruling on jurisdiction. The more controversial jurisdictional topic

is the mutual termination of sunset clauses. It remains to be seen if any investor will risk initiating arbitral proceedings after an intra-BIT has been scrapped together with the sunset clause, but any such dispute would certainly result in a clarification of the powers of the ‘masters of the treaties’.

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